Filed 6/28/12 Barraco v. Ramalho CA4/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

JOSEPH A. BARRACO et al.,	
Plaintiffs and Respondents,	E054126
v.	(Super.Ct.No. INC086200)
LAWRENCE RAMALHO,	OPINION
Defendant and Appellant.	

APPEAL from the Superior Court of Riverside County. John G. Evans, Judge. Reversed.

Law Offices of Ronald T. Golan and Ronald T. Golan; Sheila A. Williams, Walter R. Nelson, and Laura J. Fuller for Defendant and Appellant Lawrence Ramalho.

Anderholt Whittaker, J. John Anderholt III, Roman M. Whittaker, and Nikki B. Allen for Plaintiffs and Respondents.

Plaintiffs and respondents Joseph A. Barracco and Jaroslaw Paluha, individuals doing business as JJ Sage Place, filed a complaint against defendants Lawrence Ramalho and Sarika Ramalho (Lawrence and Sarika) for breach of a written contract. Plaintiffs

claimed that Lawrence and Sarika breached the lease agreement entered into between the parties. Plaintiffs moved for and were granted summary judgment. Defendant and appellant Lawrence Ramalho appeals,[1] contending the trial court erred in granting summary judgment because triable issues of fact exist as to their claim of breach and one or more of their affirmative defenses. We agree and reverse.

I. PROCEDURAL BACKGROUND AND FACTS

On November 14, 2006, plaintiffs entered into a Standard Commercial Multi-Tenant Lease (the Lease) with Lawrence and Sarika, whereby Lawrence and Sarika agreed to lease premises located at 73-255 El Paseo, Suite 21, Palm Desert, California (the Premises) for a term of five years, commencing on November 1, 2006, and ending on October 31, 2011. Lawrence and Sarika paid a $15,000 security deposit. Lawrence's ex-wife, Sarika,[2] opened a furrier store called Furrari.

Shortly after the opening of Furrari, plaintiffs leased the adjoining space to a pet store. According to Lawrence, patrons of the pet store verbally criticized the fur business, scaring off customers. In April 2008, Lawrence and Sarika ceased making payments on the Lease. On June 19, 2008, plaintiffs caused a three-day notice to pay rent or quit and a three-day notice to cure or quit to be served on Lawrence and Sarika. On or about June 30, 2008, Lawrence and Sarika vacated and surrendered possession of the Premises to plaintiffs; however, they failed to pay the past-due rent and other charges, as

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[1] We note that only Lawrence has appealed, not Sarika.

[2] According to Lawrence's declaration filed April 19, 2011, he is now divorced from Sarika, although he was married to her at the time they entered into the Lease.

well as the rent for the remainder of the Lease's term, less the amount received by plaintiffs for re-letting the Premises. Upon Lawrence and Sarika vacating the Premises, plaintiffs made repairs costing $1,015.78, including $525 on the air conditioning unit, $203.01 on electrical, and $287.77 for a locksmith to change the locks.[3]

According to plaintiffs, they were unable to relet the Premises until January 2009. They claimed that they used a good faith effort to do so by utilizing online and newspaper advertising, multiple meetings and telephone calls with local and national brokers, meetings with retailers, and placing a "For Lease" sign on the Premises.[4] On December 8, 2008, plaintiffs entered into a lease agreement with a new tenant for a term commencing on January 1, 2009, which plaintiffs claim provided for a lower rental rate than the rate in the Lease.[5]

On May 4, 2009, plaintiffs filed a complaint for breach of the Lease against Lawrence and Sarika. Plaintiffs sought damages to recover the value of the Lease, plus attorney fees and costs, less any offsets. Lawrence filed his answer on December 10, 2009, and Sarika filed her separate answer on August 11, 2010. On February 16, 2011, plaintiffs moved for summary judgment. Lawrence and Sarika filed separate oppositions on April 19, 2011. On June 22, 2011, plaintiffs' motion was granted and judgment was entered. Lawrence appeals.

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[3] There is no receipt evidencing the cost of the locksmith.

[4] Other than the declaration of Paluha, the record is void of any examples of plaintiffs' efforts at advertising the Premises.

[5] Again, other than the declaration of Paluha, the record is void of any documents evidencing the rental income resulting from the January 1, 2009 lease of the Premises.

II. STANDARD OF REVIEW

"[A]fter a motion for summary judgment has been granted, we review the record de novo, considering all the evidence set forth in the moving and opposition papers except that to which objections have been made and sustained. [Citation.]" (*Guz v. Bechtel National, Inc*. (2000) 24 Cal.4th 317, 334.) "The purpose of the law of summary judgment is to provide courts with a mechanism to cut through the parties' pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute. [Citation.]" (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843 (*Aguilar*).)

"*Aguilar* clarified the standards that apply to summary judgment motions under Code of Civil Procedure section 437c. [Citation.] Generally, if all the papers submitted by the parties show there is no triable issue of material fact and the 'moving party is entitled to a judgment as a matter of law' [citation], the court must grant the motion for summary judgment. [Citation.] Code of Civil Procedure section 437c, subdivision (p)(1), states: [¶] 'A plaintiff . . . has met his or her burden of showing that there is no defense to a cause of action if that party has proved each element of the cause of action entitling the party to judgment on that cause of action. Once the plaintiff . . . has met that burden, the burden shifts to the defendant . . . to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto. The defendant or cross-defendant may not rely upon the mere allegations or denials of its pleadings to show that a triable issue of material fact exists but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to that cause of action or a

defense thereto.'" (*Troyk v. Farmers Group, Inc.* (2009) 171 Cal.App.4th 1305, 1320.) "In reviewing whether these burdens have been met, we strictly scrutinize the moving party's papers and construe all facts and resolve all doubts in favor of the party opposing the motion. [Citations.]" (*Innovative Business Partnerships, Inc. v. Inland Counties Regional Center, Inc.* (2011) 194 Cal.App.4th 623, 628 [Fourth Dist., Div. Two].)

III. WERE PLAINTIFFS ENTITLED TO SUMMARY JUDGMENT?

Lawrence contends the trial court erred in granting plaintiffs' motion for summary judgment because triable issues of fact exist as to their claim of breach and one or more of Lawrence and Sarika's affirmative defenses.

"[T]he elements of a cause of action for breach of contract are (1) the existence of the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to the plaintiff. [Citation.]" (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 821.) Plaintiffs' sole cause of action is that Lawrence and Sarika breached the Lease, causing plaintiffs to suffer damages. In their motion for summary judgment, plaintiffs submitted the declaration of Paluha, the Lease, Notice to Quit, and Lawrence and Sarika's letter that they were vacating the Premises. According to plaintiffs' evidence, they entered into the Lease with Lawrence and Sarika, plaintiffs performed their obligations, Lawrence and Sarika breached the contract by failing to make all of the payments required pursuant to its terms, and plaintiffs suffered damages. After plaintiffs proved each element of their breach of contract cause of action, the burden shifted to Lawrence and Sarika.

In opposing the motion, Lawrence argued that (1) plaintiffs failed to comply with the requirements of Business and Professions Code, sections 17913, 17914, 17915, and 17917, (2) Paluha's declaration was not based on personal knowledge, was speculative and conclusory, (3) plaintiffs harmed Sarika's business by leasing the adjoining space to a pet store, and (4) plaintiffs refused to relet the Premises to Lawrence for the purpose of medical suite of offices. Regarding Paluha's declaration, Lawrence raised several evidentiary objections, all of which the trial court overruled. We consider Lawrence's challenges.

To begin with, Lawrence claims that plaintiffs should not have been allowed to proceed with their lawsuit because they failed to file a fictitious business name statement with the county clerk.(Bus. & Prof. Code, § 17913, et seq.) However, according to the record before this court, plaintiffs did file a fictitious business name statement during the relevant period of time.

Next, Lawrence objected to Paluha's declaration to the extent Paluha claimed: (1) a three-day notice was served on Lawrence and Sarika; (2) Lawrence and Sarika served a letter notifying that they had vacated the Premises; (3) Lawrence and Sarika received free rent in November and December 2006; (4) the monthly rent from April through October 2008 was $10,350, and in November and December 2008 it was $10,822; (5) the monthly late fees from April through December 2008 were $621; (6) Lawrence and Sarika's portion of the monthly common area maintenance fees for 2008 was $1,265.93; (7) plaintiffs were unable to relet the Premises, despite a good faith effort to do so, until January 1, 2009; (8) the new lease on the Premises was for less than

the amount plaintiffs would have received under the Lease; and (9) plaintiffs' total damages amounts to $141,441.43. Lawrence challenges Paluha's declaration, contending the trial court erred in overruling Lawrence's nine objections.

We review the trial court's evidentiary rulings for an abuse of discretion. (*Carnes v. Superior Court* (2005) 126 Cal.App.4th 688, 694 [weight of authority holds that an appellate court reviews a trial court's final rulings on evidentiary objections on a motion for summary judgment for an abuse of discretion].) This standard is guided by various principles set out in the case law: "'[T]he appropriate test of abuse of discretion is whether or not the trial court exceeded the bounds of reason, all of the circumstances before it being considered.' . . . Other cases suggest that a court abuses its discretion only when its ruling is arbitrary, whimsical, or capricious. [Citations.]" (*Miyamoto v. Department of Motor Vehicles* (2009) 176 Cal.App.4th 1210, 1218.) As the appellant and proponent of his evidentiary objections, Lawrence has the burden of demonstrating reversible error. (*Ballard v. Uribe* (1986) 41 Cal.3d 564, 574.)

Although the trial court overruled each of Lawrence's evidentiary objections to Paluha's declaration, we conclude that some of the objections had merit and should have been sustained. Specifically, to the extent the declaration states that JJ Sage Place was unable to relet the Premises, despite a good faith effort to do so, until January 1, 2009, we note that Paluha offers no evidence, other than his mere claim, of what those efforts consisted. There are no copies of advertisements, notices, or signs showing the Premises available to rent, attached to his declaration. Nor does Paluha claim that he personally caused such advertisements, notices or signs to be posted. Rather, he generically claims

"JJ Sage Place displayed a 'for rent' sign at the Premises and advertised both online and in the Desert Sun newspaper. JJ Sage Place held multiple meetings and phone calls . . . . JJ Sage Place also responded to online inquiries of potential tenants . . . . JJ Sage Place held meetings with other retailers . . . . Finally, JJ Sage Place also spoke with other local business people to generate interest in the Premises." Paluha is not declaring that he exerted these efforts to relet the Premises. Rather, he generically claims that JJ Sage Place took such actions. JJ Sage Place is merely a fictitious business name under which Paluha and Barraco were conducting business. However, to the extent the actions were not taken by Paluha himself, his statements are based on what someone else told him JJ Sage Place had done. As such, the statements were based on hearsay and thus inadmissible. Further, Lawrence claimed that he "proposed to plaintiffs, [that he] be allowed to convert the [P]remises into a Medical Suite of offices and that [he] would open up a Medical Practice on the [P]remises." However, they denied his request. Plaintiffs' only response is via Paluha's supplemental declaration, which denies that Lawrence ever made such offer.

Moreover, regarding Paluha's claim that the Premises were relet for a lower monthly rental fee, again, we note there is no copy of such lease attached to Paluha's declaration. Again, Paluha's statement is based on hearsay and is thus inadmissible. Paluha's statements regarding plaintiffs' attempt to relet the Premises, and their subsequent damages, are at best equivocal, and the trial court abused its discretion in

overruling Lawrence's Objection Numbers 7, 8, and 9.[6] Thus, a triable issue of fact exists.

Finally, Lawrence claims that any performance due on the part of him and Sarika under the Lease was excused because plaintiffs leased adjoining space to a pet store, which hurt Sarika's furrier business. However, Lawrence failed to offer any letters or notices that were sent to plaintiffs regarding animal lovers harassing the Furrari customers and causing the store to lose business. Further, assuming the customers of Furrari were harassed, Lawrence has failed to offer any statement from any customer regarding such harassment. His statements amount to nothing more than hearsay. Nonetheless, since we have found sufficient reason, as stated above, to reverse the judgment on the grounds that Lawrence has established the existence of a triable issue of fact, this issue may be more fully developed during discovery.[7]

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[6] During oral argument, plaintiffs faulted this court for sustaining Lawrence's objection Nos. 8 and 9 based on hearsay on the grounds that no hearsay objection was made. We disagree. Lawrence cited Evidence Code section 1200 (the hearsay rule) in his "Grounds of Objection."

[7] At oral argument, Lawrence faulted this court for failing to address the issue of whether his objection to summary judgment on the ground he needed to conduct more discovery required the trial court to deny, or at least continue, hearing on the motion. We note that this issue was raised for the first time in Lawrence's reply brief. "'[T]he rule is that points raised in the reply brief for the first time will not be considered, unless good reason is shown for failure to present them before. [Citations.]' [Citation.]" (*People v. Smithey* (1999) 20 Cal.4th 936, 1017, fn. 26.) Moreover, although we conduct a de novo review of a trial court's grant of a motion for summary judgment, we "'[are] not required to make an independent, unassisted study'" to try to find grounds for a party's position (*Guthrey v. State of California* (1998) 63 Cal.App.4th 1108, 1115), nor will a court "develop the [parties'] arguments for them . . . ." (*Dills v. Redwoods Associates, Ltd.* (1994) 28 Cal.App.4th 888, 890, fn. 1.)

IV. DISPOSITION

The judgment is reversed. Lawrence shall recover his costs on appeal.

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HOLLENHORST
J.

We concur:

RAMIREZ
P.J.

MILLER
J.